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No. 91-1030

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAMELA WITHROW,

Petitioner,

—v.—

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MICHIGAN IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization with nearly 300,000 members, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Michigan is one of its statewide affiliates.

The ACLU has long worked to protect the rights of criminal defendants and their access to the federal courts and has filed many briefs, as direct counsel or as *amicus curiae*.

The warden's argument that Williams failed to exhaust Michigan state court remedies regarding the voluntariness claim is case-specific and will doubtless be addressed adequately by the parties. Accordingly, this *amicus* brief is limited to the warden's other contentions, which seek sweeping limitations on the rights of state prisoners with implications well beyond this particular dispute.

STATEMENT OF THE CASE

The respondent, Robert Allen Williams, Jr., was convicted of homicide in a Michigan state court and is now serving consecutive life sentences. Over his objection at trial, the prosecution was allowed to introduce statements he made to the police during interrogation at the station after Williams had been driven there in a police vehicle.

The officers told Williams that if he answered their questions, they would "check . . . out" his story, but that if he failed to cooperate they would "charge" him and "lock . . . [him] up." Petitioner's Appendix A at 3(a). In presenting Williams with this Hobson's choice, the police failed to observe the procedural safeguards man-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

dated by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), to secure the Fifth Amendment privilege against self-incrimination.

Only after Williams made statements linking himself to the crime did the officers tell him that he was under arrest, and only then did they give him "*Miranda* warnings." Continuing the interrogation, the officers promised Williams that if he told them what had happened, he would not himself be charged. Petitioner's Appendix A at 5(a). Thereafter, Williams gave further incriminating statements.

The trial court concluded that "*Miranda* warnings" were unnecessary with respect to Williams' first statements, because the interrogation was not sufficiently "custodial" until the officers decided to place Williams formally under arrest. The state appellate court affirmed that disposition of the *Miranda* claim.

In federal habeas corpus, the district court recognized that the question whether Williams was in "custody" for purposes of *Miranda* did not turn on the formalities of arrest under state law. Applying this Court's precedents regarding the "custody" issue to the circumstances of this case, the district court concluded that Williams was in "custody" at the time he first gave incriminating statements in the absence of warnings. In addition, the district court held that Williams' subsequent statements were involuntary, and thus inadmissible under the Due Process Clause, largely because they were obtained in response to an explicit promise of leniency. The circuit court affirmed the district court's decisions on both issues. Petitioner's Appendix A at 17(a)-18(a).

In this Court, the warden argues: (1) that Williams failed to exhaust state remedies with respect to the voluntariness question; (2) that *Miranda* claims should not be entertained in habeas corpus if the state courts offered the prisoner an opportunity for "full and fair" litigation; (3) that Fifth Amendment privilege claims, as

distinguished from *Miranda* claims, should also be excluded from consideration in habeas corpus; and (4) that the circuit court's decision on the voluntariness issue depends on a "new rule" of law that is inapplicable in federal habeas corpus.

The parties dispute whether the warden conceded or waived the exhaustion issue below. The warden's argument that all *Miranda* claims, and, indeed, all Fifth Amendment privilege claims, should be excluded from federal habeas corpus was not raised until the district court had granted relief on the *Miranda* ground. The warden's final argument -- that even the involuntariness claim in this case should be excluded from habeas corpus because it depends on the application of a "new rule" -- was never raised at all below.

SUMMARY OF ARGUMENT

This is one in a series of cases in which this Court is being pressed to make wholesale cuts in the ability of the federal courts to enforce the Bill of Rights in federal habeas corpus. Unable to marshal the necessary votes in Congress to alter the federal courts' jurisdiction by statute, some state attorneys general, the United States Department of Justice, and allied private *amici* persist in asking this Court to give them the political victory they have been unable to achieve in the legislative branch -- and thus to legislate *for* Congress.

Twice within the past year, this Court has recognized the inappropriateness of this request. In *Stringer v. Black*, __ U.S. __, 112 S.Ct. 1130 (1992), and *Wright v. West*, __ U.S. __, 60 U.S.L.W. 4639 (1992), this Court noted that under the 1867 Habeas Corpus Act and a long line of precedents, the federal courts have both authority and responsibility to exercise independent judgment on the merits of properly preserved federal claims.

Now that the Court has declined to establish blanket limitations on the federal courts' authority with respect

to all claims raised in habeas corpus, the Court is being pressed here and in *Brecht v. Abrahamson*, No. 91-7358, *cert. granted*, 60 U.S.L.W. 3827 (June 8, 1992), to pare habeas corpus down, one set of claims at a time.

The path the Court is asked to take leads beyond *Miranda* to myriad other claims and cases and ultimately curves back to the sweeping propositions the Court has so recently deflected in *Wright v. West*, 60 U.S.L.W. 4639.[2] For example, the warden's argument in this case rests on two sweeping claims: first, that this Court can and should banish not only *Miranda* claims, but core Fifth Amendment privilege claims, and, indeed, all constitutional claims from federal habeas corpus; second, that the courts below announced a "new rule" of law when they invoked the conventional principle that confessions obtained by coercive methods are involuntary. Petitioner's Brief at 88; 97-98 n.66; 15-16 n.3.

The warden and the *amici* supporting her tell a misleading story about the history of modern habeas corpus, which largely ignores the paramount role that Congress has played and slides over decisions by this Court that refute their arguments.[3]

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[2] *See, e.g., Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991)(candidly proposing that the federal courts be forced to defer to state court judgments on the merits by the indirection of relaxing the harmless error rule in habeas corpus actions).

[3] For example, the Criminal Justice Legal Foundation (hereafter CJLF) ignores hotly contested debates regarding the meaning of classic precedents and blithely pronounces that the "older" cases are "squarely against" the rule that the federal courts exercise independent judgment regarding federal claims and that "recent developments" have established "substantial exceptions to *de novo* review." CJLF Brief at 2. Elsewhere, the CJLF acknowledges the argument, made by *amici* in *Wright v. West*, 60 U.S.L.W. 4639, that Congress codified *Brown v. Allen*, 344 U.S. 443 (1953), in 1966 when it enacted legislation that usually requires the federal courts to defer to state court findings of primary fact, but not to state court determinations of law (continued...)

The warden asks the Court to reinterpret the Habeas Corpus Act to exclude *Miranda* claims from the federal habeas courts' jurisdiction. That argument is refuted by the express terms of the Act, 28 U.S.C. §§2241-2255, and this Court's many precedents interpreting the Act.

Alternatively, the warden asks the Court to reinterpret *Miranda* itself to be unenforceable in habeas corpus. That argument is equally flawed. There is no analogy to the Fourth Amendment exclusionary rule. *Miranda* held that it is unconstitutional for the state courts to admit incriminating statements given in response to custodial interrogation without proof that effective safeguards were observed to avoid compulsion.

Miranda is not a judge-made rule of evidence, employed to vindicate a right having nothing to do with the criminal process. *Miranda* secures the privilege against self-incrimination, which is itself a rule of exclusion that protects the reliability and fairness of criminal trials. The violation in a Fourth Amendment case is complete when the police invade a citizen's privacy. The violation in a *Miranda* case is complete only when improperly obtained statements are used at trial -- undercutting the reliability and fairness of the fact-finding process.

Furthermore, the elimination of *Miranda* claims from habeas corpus would increase the time and effort the

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[3] (...continued)
or the application of law to fact. Yet rather than meeting that argument, the CJLF simply declares it "weak" and passes on to the entirely different argument that Congress' failure to enact restrictive legislation since 1966 indicates an acceptance of *Brown*. Moreover, the CJLF even mischaracterizes *that* argument by suggesting that "power brokers" in Congress are attempting to "divest" this Court of an ability to modify its own precedents. CJLF Brief at 9. That characterization grossly distorts the important point that Congress has repeatedly refused to limit the writ in the way the CJLF would have the Court limit it by its decision in this case. *See Wright v. West*, 60 U.S.L.W. at 4647 (O'Connor, J., concurring in the judgment).

federal courts devote to confession cases and generate additional friction with the states. If habeas petitioners were unable to raise *Miranda* claims in federal court, many would recast their arguments as Fifth Amendment or due process claims, compelling federal courts to face the same issues, but without the clarity provided by the *Miranda* rules.

The warden's argument that core Fifth Amendment claims -- indeed, all constitutional claims -- can unilaterally be jettisoned from habeas corpus is an affront to the jurisdiction conferred on the federal courts by Congress and this Court's many precedents respecting Congress' judgment.

The contention that the courts below improperly applied a "new rule" of law when it invoked the well-settled principle that involuntary confessions are inadmissible deeply mistakes the purpose and effect of this Court's recent decisions on the retroactive effect of changes in the law. This case involved only the determination of an ordinary "mixed" question of law and fact -- not an innovation in the controlling substantive legal standard.

ARGUMENT

I. UNDER APPLICABLE FEDERAL STATUTES, AS AUTHORITATIVELY INTERPRETED BY THIS COURT, A FEDERAL DISTRICT COURT PLAINLY HAS SUBJECT MATTER JURISDICTION IN HABEAS CORPUS TO ENTERTAIN A CLAIM THAT A STATE PRISONER'S CONVICTION RESTS ON A STATEMENT ADMITTED IN VIOLATION OF *MIRANDA v. ARIZONA*

The federal courts' jurisdiction in habeas corpus is conferred by the Habeas Corpus Act, 28 U.S.C. §§2241-2255, which establishes the power and duty to issue the writ on behalf of a prisoner who is "in custody in

violation of the Constitution or laws . . . of the United States."[4] This language admits no exceptions: claims grounded in federal law are plainly cognizable.[5]

Commentators debate the proper understanding of older cases, and it is scarcely necessary to tramp that ground yet again.[6] All sides concede that for the nearly forty years since *Brown v. Allen*, 344 U.S. 443, this Court has read §2241 to include all manner of federal claims.[7]

This Court has always declined to decide on its own that particular claims should be excluded from the habeas jurisdiction, but has respected the policy judgments made by Congress.[8] In *Berkemer v. McCarthy*, 468 U.S.

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[4] *Accord* 28 U.S.C. §2254(a)(restating the same jurisdictional grounds for cases in which state prisoners attack state criminal convictions).

[5] The CJLF offers a series of "purposes" it thinks might be served by federal adjudication of federal claims and attempts to rebut each one -- as though the scope of the federal courts' jurisdiction were not controlled by §2241 and this Court's longstanding interpretations of that statute. Passing on, the CJLF takes up various "proposals for modification" of habeas corpus and, "[l]ooking through this list," suggests, again, that this Court may fashion what policies it wishes regarding a jurisdictional matter the Constitution assigns to the legislative branch. CJLF Brief at 11, 15. Thus, the very approach the CJLF takes to this case reveals that it regards this Court as merely another political arena in which to pursue its political agenda. *Cf.* Brief of the Americans for Effective Law Enforcement and the National District Attorneys Association at 7 (admitting that the *amici* have long sought "legislation" to accomplish their goals and that, "[i]n the absence of such legislation," this Court's "continuing efforts . . . to achieve reform . . . is [sic] the criminal justice system's best hope . . . .").

[6] In *Wright v. West*, 60 U.S.L.W. 4639, Justice O'Connor noted numerous errors in the boilerplate occasionally used to summarize the development of the modern writ.

[7] *Wright v. West*, 60 U.S.L.W. 4639. Unable to deny that *Brown* stands in her way, the warden simply proposes that this fundamental precedent in habeas corpus law be overruled. Petitioner's Brief at 98.

[8] The CJLF asserts that the question whether the federal courts have (continued...)

420 (1984), the Court awarded relief on the merits of a *Miranda* claim. That holding included, as a necessary element, an authoritative interpretation of §2241 that placed *Miranda* claims within the federal courts' jurisdiction in habeas corpus.[9]

A. The Decision In *Stone v. Powell* Establishes No Precedent For Excising *Miranda* Claims From The Federal Courts' Jurisdiction

Nothing in *Stone v. Powell*, 428 U.S. 465, suggests that §2241 permits this Court to isolate selected claims and simply jettison them from the federal courts' jurisdiction. In *Stone*, the Court explained that it was merely continuing its modern elaboration of the Fourth Amendment exclusionary rule and concluding, as a step in the development of that rule, that it should not ordinarily be enforced in federal habeas corpus. *Allen v. McCurry*, 449 U.S. 90, 98 (1980). *Stone*, then, was not a case about the scope of habeas corpus; it was a case about the scope of the exclusionary rule. Justice Powell's opinion was explicit on this point:

> Our decision does not mean that the federal court lacks jurisdiction over . . . [an exclusionary rule] claim . . . .

Stone, 428 U.S. at 494 n.37.

This *had* to be true in *Stone*. If the decision largely to exclude Fourth Amendment claims from habeas corpus had been jurisdictional, the Court would have been unable to decide, at the same time, that Fourth Amendment claims could still be entertained if prisoners were denied an opportunity to raise them in state court. Yet that is precisely what the Court did decide. *Id.* at 494.[10]

This is not to say that the effect of *Stone* was blunted merely because that decision was based on an interpretation of substantive federal law rather than §2241. In the wake of *Stone*, the federal habeas courts have

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[8] (...continued)
jurisdiction to consider federal claims "should" be answered on an "issue by issue" basis. CJLF Brief at 2. That is *not* the way the habeas jurisdiction has been understood.

[9] There are also many cases in which this Court has denied relief on the merits. *E.g., Duckworth v. Eagan*, 492 U.S. 195 (1989); *Moran v. Burbine*, 475 U.S. 412 (1986); *Wyrick v. Field*, 459 U.S. 42 (1982)(*per curiam*). Recent precedents such as these cannot be set aside merely because the Court did not expressly address the possibility that the whole class of *Miranda* claims might be excluded from the habeas corpus jurisdiction. By reaching the merits the Court acknowledged that it had jurisdiction to do so. *See* 28 U.S.C. §1254 (pegging this Court's jurisdiction to review judgments rendered by the federal courts of appeals to the jurisdiction those courts exercise below).

In *Duckworth v. Eagan*, 492 U.S. 195, Justice O'Connor urged the Court to decide the case on the broader ground and suggested a jurisdictional basis for doing so. *Id.* at 213. The full Court responded with the notation that, since the warden had not argued for the extension of *Stone v. Powell*, 428 U.S. 465 (1976), to *Miranda* claims, it was unnecessary to decide that question. *Duckworth*, 492 U.S. at 201 n.3. If the Court had considered the *Stone* issue to be jurisdictional, it scarcely would have said that it could be put aside merely because a party had not raised it. Of course, *Stone* itself was not decided on a jurisdictional basis -- as we demonstrate below.

[10] The CJLF concedes that *Stone* had nothing to do with the breadth of the federal habeas jurisdiction, but argues that *Stone* nevertheless did two things: (1) it established that "*de novo* review is not required for all constitutional claims," and (2) it offered "criteria" for deciding whether other issues can be raised in federal court. CJLF Brief at 18. The first point is an obvious *non sequitur*. Since *Stone* was exclusively a Fourth Amendment case, it follows that *Stone* is irrelevant to the availability of the federal courts in cases involving other claims. Again, Justice Powell was explicit:

> [O]ur decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.

Stone, 428 U.S. at 494 n.37 (emphasis in original).

We address the CJLF's second argument below.

ceased to consider Fourth Amendment exclusionary rule claims at all. We are aware of few recent cases in which a federal court has held that a prisoner was denied an opportunity for state court litigation, such that a Fourth Amendment claim was open for federal examination.

Jurisdictional or not, *Stone* put the federal habeas courts out of the Fourth Amendment business. If the warden's view were accepted, the federal courts would be equally disabled in Fifth Amendment cases.

This case vividly illustrates the implications. The state courts erroneously thought that "custody" turned on the subjective intentions of the police and, accordingly, that *Miranda* was not triggered until the officers who questioned Williams decided to initiate formal arrest procedures. Yet in *Berkemer v. McCarthy*, 468 U.S. 420, this Court had explained that "custody" depends on the reasonable understanding of the suspect in the circumstances of a particular case. Clearly, then, Williams was in "custody" when he was taken to the station and told that he must answer questions or go to jail.

The state courts incorrectly ruled that Williams' statements were admissible, even though the police took no precautions whatever to avoid compulsion. Now, the warden insists that the federal courts have no authority to vindicate Williams' federal rights and must, instead, defer to the erroneous judgment rendered by the Michigan courts.

B. Recent Decisions On The Retroactive Application Of New Rules Of Law Support The Federal Courts' Authority To Hear *Miranda* Claims

This Court's recent decisions from *Teague v. Lane*, 489 U.S. 288 (1989), through *Stringer v. Black*, 112 S.Ct. 1130, fully support the jurisdiction of the federal courts to entertain ordinary *Miranda* claims. Those cases have only to do with a genuine change in the legal principle

applicable to a claim, announced after the case left state court. They do not restrict the authority of a federal court to apply settled law to the facts of particular cases.[11] Cases like *Saffle v. Parks*, 494 U.S. 484 (1990), do *not* stand for the revisionist proposition that the federal courts only review state judgments "to see if the state courts were unreasonable in their conclusion." CJLF Brief at 21. *Wright v. West*, 60 U.S.L.W. 4639 at 4647 (Kennedy, J., concurring in the judgment).[12]

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[11] If cases in the *Teague* line meant that ordinary *Miranda* claims were not within the habeas jurisdiction, then the Court in *Butler v. McKellar*, 494 U.S. 407 (1990), would hardly have been at pains to explain that the particular development in the *Miranda* framework on which the prisoner in that case relied had not occurred until after his conviction.

[12] Obviously, the district court did not invoke a change in the law when it held that Williams was in "custody" for *Miranda* purposes. The district court properly relied on *Berkemer v. McCarthy*, 468 U.S. 420, handed down on July 2, 1984 -- nine months before the police questioned Williams and more than a year before the state trial court acted. In *Berkemer*, the Court acknowledged that it might have chosen a legal standard for "custody" that would cover all traffic-stop cases. Thus, the Court might have held that "custody" always exists when a car is stopped, or that "custody" never exists until the police place a suspect formally under arrest. Instead, the Court located the definition of "custody" at a higher level of generality, knowing that other courts would have to exercise judgment in individual cases. *Cf. Wright v. West*, 60 U.S.L.W. at 4648 (Souter, J., concurring in the judgment). The test for "custody," then, is precisely the kind of standard that rarely generates "new rules" when it is invoked in analogous cases. *See id.* at 4647 (Kennedy, J., concurring in the judgment). Finally, there were no special facts here, such that reliance on *Berkemer*, 468 U.S. 420, can be characterized as the application of an old rule in a "novel setting," *id.*, or in circumstances that alter the "force" with which a principle operates. *Id.* at 4646 (O'Connor, J., concurring in the judgment).

C. Recent Decisions Excluding Claims For Procedural Reasons Also Support The Federal Courts' Power To Entertain *Miranda* Claims

This Court's cases foreclosing federal consideration of claims because of procedural default in state court ensure that the issues the federal courts entertain on the merits are presented in the proper procedural posture. Those decisions have nothing to do with the federal courts' authority to adjudicate the merits of claims properly before them. *Wainwright v. Sykes*, 433 U.S. 77, 87 (1977)(drawing this critical distinction).

Similarly, the cases largely foreclosing multiple petitions from a single prisoner clearly preserve the federal courts' jurisdiction to determine claims "presented in a proper procedural manner." *McCleskey v. Zant*, __ U.S. __, 111 S.Ct. 1454, 1462 (1991).[13]

D. There Is No Analogy To Cases Holding That Minor Flaws In Federal Trials Cannot Be The Basis Of Attacking Federal Convictions Collaterally

Decisions like *United States v. Timmreck*, 441 U.S. 780 (1979), have no bearing on the federal courts' authority and responsibility to entertain *Miranda* claims. *Timmreck* stands only for the unremarkable proposition that minor violations of the Federal Rules of Criminal Procedure cannot be the basis for challenging *federal* convictions collaterally by way of 28 U.S.C. §2255. If minor infractions *were* cognizable in §2255 proceedings,

[13] Here again, the CJLF slides over clear analytical distinctions between whole bodies of precedent, lifting any language that seems helpful to its cause without pausing to recognize the entirely different issues at stake in each context. CJLF Brief at 21 (drawing an unsupportable parallel between the *Teague* cases and cases on procedural default and successive federal petitions).

collateral review might be consumed by trivial complaints.

Since every claim a federal prisoner may have is a matter of federal law, wholly federal cases call for some dividing line between minor complaints of form that should be addressed only at trial or on direct review, on the one hand, and more "fundamental defects" of the caliber to warrant collateral review, on the other.[14]

In habeas corpus cases involving state prisoners, by contrast, there is no similar need or justification for distinguishing between technical claims and those of more substance. Rarely does a state prisoner have a federal claim that is not firmly anchored either in a provision of the Bill of Rights, such as the Fifth Amendment privilege secured by *Miranda*, or the Due Process Clause of its own force.[15] All such claims go to the fundamental validity of criminal convictions and, thus, to the validity

[14] *Hill v. United States*, 368 U.S. 424, 428 (1962). Stated literally, the description of cognizable claims provided by *Hill* is extremely narrow -- claims that reflect a "fundamental defect which inherently results in a complete miscarriage of justice." *Id.* But, of course, that description has never been *taken* literally, for the obvious reason that any error that results in a "complete miscarriage of justice" would violate due process. A working definition of the kind of *non*constitutional claims that can be considered in §2255 proceedings cannot sensibly exclude everything that is not of constitutional moment. *Cf. Davis v. United States*, 417 U.S. 333, 356 (1974)(squarely rejecting the argument that §2255 is limited to constitutional claims). In *Hill* itself, the claim was a violation of Rule 32(a); in *Timmreck*, it was a violation of Rule 11. Those claims provide the best illustrations of issues the Court has found insufficient to justify collateral review of federal criminal convictions. Needless to say, they are a far cry from *Miranda* claims, which go to the reliability of confessions, the integrity of the individual, and the adversarial structure of American criminal justice.

[15] It demeans the gravity of the contentions in this case for the CJLF to suggest that serious constitutional claims can be excluded from the jurisdiction of the federal courts simply because *pro se* prisoners may couch frivolous contentions in constitutional language. CJLF Brief at 11 n.3.

of prisoners' detention.[16] All such claims, accordingly, are cognizable in federal habeas corpus in the ordinary course.[17]

II. THE PROCEDURAL FRAMEWORK ESTABLISHED IN *MIRANDA* CANNOT BE REINTERPRETED TO BE ENFORCEABLE ONLY AT TRIAL OR ON DIRECT REVIEW

Unable to defeat Williams by depriving the federal habeas courts of subject matter jurisdiction to entertain his *Miranda* claim, the warden and supporting *amici* next attempt to defeat him through a reinterpretation of the substantive claim he seeks to vindicate.

In *Stone v. Powell*, 428 U.S. 465, this Court held that the Fourth Amendment exclusionary rule does not include as one of its elements a right to a federal writ of habeas corpus on the ground that the police obtained evidence through an unreasonable search or seizure. In this case, the warden asks the Court to hold that the framework established in *Miranda* for securing the privilege against self-incrimination does not include an ability to seek habeas relief on the ground that incriminating statements obtained in violation of *Miranda* were erroneously allowed into evidence at trial.

Simply stated -- and it is simply stated rather than argued -- the warden and her *amici* have it that, when it comes to habeas corpus, *Miranda* claims cannot be distinguished from Fourth Amendment exclusionary rule claims. Given *Stone*, they think their desired result in this case follows as a logical imperative. Petitioner's Brief at 88. On examination, however, *Miranda* claims are nothing like exclusionary rule claims in any respect that matters to habeas corpus.

A. It Is Misleading To Characterize *Miranda* As An Exercise In Nonconstitutional Judicial Law-Making

At the outset, the warden and other *amici* assert that the procedural safeguards established in *Miranda* are not themselves constitutional law, but a set of prophylactic rules fashioned by this Court to "over-protect[]" the Fifth Amendment privilege. Petitioner's Brief at 91. The United States, indeed, insists that the nonconstitutional character of *Miranda* provides the fulcrum on which the persuasive power of the analogy to *Stone* can be made to turn. Brief of U.S. at 8-9. This attempt to define *Miranda* out of habeas corpus is fundamentally flawed.[18]

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[16] The rationale of *Stone* is that Fourth Amendment exclusionary rule claims do not go to the fundamental validity of criminal convictions. *See* note 27 *infra*. By contrast, a defendant who is convicted on the basis of a confession obtained without the *Miranda* safeguards clearly *is* in custody in violation of federal law precisely because the conviction the state asserts to justify his detention clearly *is* rendered unlawful by the state's failure to safeguard the Fifth Amendment privilege.

[17] There is no basis for warden's argument that the federal "laws" to which the habeas statutes refer are necessarily statutes. Petitioner's Brief at 92-93. The very case on which the warden places so much emphasis, *Stone*, confirms that (in cases in which there was no opportunity for state court litigation) the federal habeas courts have jurisdiction to determine exclusionary rule claims, deemed in *Stone* to be a matter of federal nonconstitutional law. The *amicus* brief on behalf of some state attorneys general similarly neglects *Stone* in arguing that *Miranda* claims do not "meet the jurisdictional prerequisites for federal habeas review." Brief of Lungren, *et al.*, at 8. *Cf. Illinois v. Milwaukee*, 406 U.S. 91 (1972)(holding that suits pressing federal common law rights are actions "arising under" federal law within the meaning of 28 U.S.C. §1331).

[18] It is not apparent what mileage the warden and other *amici* hope to get from reducing *Miranda* claims to nonconstitutional status. Even if the safeguards established in *Miranda* were not in some instances (and in some sense) constitutionally compelled, it hardly would follow that the Court is free to take whatever free-wheeling direction a slim majority of sitting members might choose. Even decisions regarding judicially created rules are bound to respect the ordinary constraints that reasoned elaboration imposes on life-tenured judges.

Much of the *Miranda* framework *is* constitutional law, and this Court has never suggested otherwise. Prior to *Miranda*, some courts and commentators had taken the view that the privilege against self-incrimination only protected a citizen against being compelled to give evidence against himself in a judicial proceeding: both the compulsion and the use of the compelled testimony had to occur together. In *Miranda*, however, the Court held that compulsion and use may be separated in time and place: the Fifth Amendment bars the use of a compelled statement even if it was obtained previously in the course of custodial interrogation outside the court room. That holding was "constitutional." *Miranda*, 384 U.S. at 460-61.[19]

In addition, *Miranda* squarely held as a matter of constitutional law:

> [T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Id. at 444.

Since this core constitutional decision in *Miranda*, the Court has only once held that the Fifth Amendment allows the use of a defendant's own statement as part of the prosecution's case in chief without *some* showing that *some* measures were taken to avoid compelling the defendant to incriminate himself.[20] In the absence of a "fully effective equivalent" framework, the familiar *Miranda* safeguards are constitutionally "required." *Id.* at 476, 479.[21]

Relief was granted in the cases before the Court in *Miranda* on the ground that "[i]n each instance . . . statements [had been] obtained . . . under circumstances that did not meet *constitutional* standards for the protection of the privilege." *Id.* at 491 (emphasis added).

As the warden correctly points out, this Court said in *Miranda* that the Constitution does not mandate any "specific code of procedures" for securing the privilege and invited state legislatures and Congress to develop alternatives, so long as they are "fully as effective" as the Court's own. *Id.* at 490. The Court also said that the statements at issue in that case were not necessarily "involuntary in traditional terms." *Id.* at 457.

Yet the conclusion the warden draws from the Court's statements in *Miranda* is plainly wrong. Given the unremarkable concession that a confession is not necessarily compelled in the Fifth Amendment sense if the prosecution fails to demonstrate each of the elements of the *Miranda* framework, the warden leaps to the proposition that compliance with the *Miranda* safeguards is entirely divorced from the constitutionality of a conviction obtained by violating them. By the warden's sights, this Court's careful opinion in *Miranda* was little more than an ambitious essay about what state prosecutors ought to show before introducing an incriminating statement at trial.[22]

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[19] The lion's share of Justice Harlan's dissent in *Miranda* was devoted to a criticism of the majority for "extending the Fifth Amendment's privilege against self incrimination to the police station." 384 U.S. at 510. *Accord Michigan v. Tucker*, 417 U.S. 433, 443 (1974)(reading *Miranda* to have decided for the first time that the constitutional privilege is "applicable to state interrogations at a police station").

[20] In *New York v. Quarles*, 467 U.S. 649 (1984), the Court recognized a (continued...)

[20] (...continued)
"public safety" exception in a case in which the police needed to ask questions in order to secure a loaded gun.

[21] *Accord Oregon v. Elstad*, 470 U.S. 298, 370-71 (1985)(Stevens, J., dissenting).

[22] By contrast, that case was a firm constitutional decision regarding (continued...)

The principal precedent cited in support of this revisionism is *Michigan v. Tucker*, 417 U.S. 433. *Tucker* involved an interrogation conducted before the *Miranda* decision had come down. Even without this Court's guidance regarding the precautions constitutionally mandated to avoid compulsion, the police had given the suspect most of the warnings *Miranda* would later require and specifically asked him whether he wanted an attorney. They failed only to tell the suspect that, if he could not afford to hire a lawyer, one would be provided for him free of charge. On that record, this Court was unwilling to hold that the statement the police obtained was compelled.

Tucker, accordingly, is perfectly consistent with the settled principle that effective safeguards are demanded constitutionally, but that a single departure from the *Miranda* framework may not, in some circumstances, render a confession constitutionally deficient. *Tucker* has nothing to say about cases like this one -- in which the police observed no safeguards at all during the custodial interrogation that produced Williams' initial statements. The line the warden attempts to draw between the flawed procedures employed in *Tucker* and the absence of procedures in this case ignores a distinction of constitutional dimension.

Moreover, *Tucker* did not rely on the nonconstitutional character of the error in that case to justify admitting the defendant's own statement -- as the warden hopes to justify the use of Williams' statements here. *Tucker* used its holding that the defendant's statement was not compelled in the constitutional sense only to distinguish *Wong Sun v. United States*, 371 U.S. 471 (1963), and, thus, to escape the fruit-of-the-poisonous-tree

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[22] (...continued)
what prosecutors are "required" to show to assure that the Fifth Amendment is to be "scrupulously honored." 384 U.S. at 479.

doctrine.

The statement that *Tucker* permitted the prosecution to introduce was given by a witness to whom the defendant's statement led the police. In *Tucker*, accordingly, the Court easily held that the defendant had not been compelled to be a witness against himself -- because the evidence in issue was given by a third party. In so holding, the Court expressly pointed out that the admission of the witness' statement in no way compromised the reliability of the fact-finding process at trial. For while flaws in the safeguards used in the interrogation of the defendant plainly would undercut the reliability of his statement, those violations could not draw into question the reliability of a statement freely given by another, not subject to the same interrogation.[23]

The warden's characterization of *Miranda* as a matter of nonconstitutional law is thus grossly misleading. In the run of *Miranda* cases, the use of a defendant's own statements obtained in the absence of warnings and waivers plainly violates the Fifth Amendment privilege against self-incrimination.[24]

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[23] This is the ground on which Justice White concurred in *Tucker*.

[24] This Court has repeated the statement that *Miranda* violations do not always implicate the Constitution in other cases -- but never in any manner critical to the result. In *Oregon v. Elstad*, 470 U.S. 298, the Court held only that a failure to comply with the *Miranda* safeguards initially does not forever bar further interrogation. Even at that, the Court emphasized that the circumstances of the interrogation in *Elstad* were not coercive. In *New York v. Quarles*, 467 U.S. 649, the Court candidly subordinated the constitutional values served by *Miranda* to the overriding public interest in safety.

B. *Miranda* Is Not A Judge-Made Evidentiary Rule And Cannot Be Treated In The Manner Of The Fourth Amendment Exclusionary Rule In *Stone v. Powell*

The characterization of *Miranda* as a court-fashioned evidentiary rule is equally misleading and, thus, cannot be analogized to the Fourth Amendment exclusionary rule interpreted in *Stone v. Powell*, 428 U.S. 465.

The exclusionary rule established in *Mapp v. Ohio*, 367 U.S. 643 (1961), has come to be understood by the Court not as a constitutional right in itself, but as a judicially created means of enforcing a constitutional right (the right against unreasonable search and seizure). The constitutional violation asserted in a Fourth Amendment case is committed when governmental agents violate the suspect's privacy. There is no necessary connection between such a constitutional violation and the criminal process. The officers alleged to have conducted an unreasonable search need not have been looking for evidence of crime, and the victim of their unconstitutional action need not be subject to criminal prosecution.

The link to the criminal process arises only because the purpose for which the police invade privacy is typically a search for criminal evidence and because, when evidence is found, the victim of the search is typically prosecuted. This being true, the Court has found it appropriate to deter future police misconduct by creating incentives to comply with the Fourth Amendment -- *i.e.*, by refusing to allow government to use the fruits of unconstitutional searches in some instances.

To decide when exclusion is appropriate, the Court has employed a cost/benefit analysis, which balances the deterrent value to be gained by excluding evidence from a particular setting against the costs of denying government (and the rest of us) the probative value of that evidence. Typically, the Court has struck the balance in

favor of admitting hard, reliable evidence of crime.[25]

The decision in *Stone* was only another decision in this line. The Court reasoned that when a habeas petitioner attacks his or her detention on the ground that the underlying conviction rests on evidence seized in violation of the Fourth Amendment, the prisoner is not asking the federal courts to upset a conviction obtained in violation of the Bill of Rights. Rather, the prisoner is seeking to use habeas corpus as an additional enforcement mechanism for a right the Court deems to have nothing necessarily to do with the regularity of, or the reliability attached to, the conviction.[26] Since the deterrent effects at the habeas stage may be diminished, the Court concluded that the costs of invoking the exclusionary rule in habeas outweigh its benefits.

Miranda, by contrast, *does* enforce an express provision of the Bill of Rights, which is itself a principle of exclusion having everything to do with the validity of criminal trials. The rule in *Miranda*, which prevents the prosecution from using a statement obtained in violation of procedures specified by the Court, flows from the underlying right those procedures vindicate: the right against being convicted on the basis of compelled testimony. The exclusion of evidence seized in violation of the Fourth Amendment is judicial policy, but the exclusion of compelled self-incrimination is constitutional law.

The violation in a *Miranda* case begins in the field when the police fail to comply with *Miranda* in taking a

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[25] *Compare Mapp v. Ohio*, 367 U.S. 643, with *United States v. Calandra*, 414 U.S. 338 (1974), and *Walder v. United States*, 347 U.S. 62 (1954).

[26] This is what Justice Powell meant in *Stone*, when he said that habeas petitioners ask for a redetermination of an issue that has "no bearing on the justice of [the prisoner's] incarceration." *Stone*, 428 U.S. at 491-92 n.31. It is why, indeed, a prisoner whose conviction was achieved on the basis of illegally seized evidence can be said *not* to be "in custody" in violation of federal law.

statement, but is complete only at trial when such a statement is used as part of the prosecution's case in chief. Evidence of that kind is excluded not to penalize a past violation, but to forestall a current violation of the Fifth Amendment.[27]

Thus, when a petitioner attacks his or her custody on the ground that a conviction rests on a confession obtained in violation of the *Miranda* framework, the prisoner raises a claim that *does* go to the procedural regularity, reliability, and integrity of the proceedings in state court that resulted in conviction. The warden and other *amici* unaccountably neglect this fundamental point.

The Court in *Miranda* explicitly stated that the framework it was putting in place was meant to ensure that criminal trials are reliable and fair. Previously, trial courts had excluded statements made to the police only after finding them involuntary under the Due Process Clause. That regime required vexing and time-consuming *ad hoc* inquiries into the peculiar facts of each case. Since the participants in interrogation sessions were typically limited to the suspect and the police, fact-finding hearings often degenerated into swearing contests in which suspects alleged coercive tactics and the officers involved denied them. Faced with conflicting testimony, trial courts typically could not find the

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[27] The purpose of *Miranda* cannot have been merely to prevent compulsion for its own sake. For compulsion alone does not violate the Fifth Amendment. This is plain from the cases permitting the government to compel witnesses to give testimony so long as their statements are not used as evidence in a criminal prosecution. *E.g., Kastigar v. United States*, 406 U.S. 441 (1972).

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court recognized that while the rules announced in *Miranda* would affect the behavior of police in the field, the "basis of the decision was the need to protect the fairness of the trial itself . . . ." *Id.* at 240. There is, said the Court in *Schneckloth*, a "vast difference" between the rights guaranteed by the Fourth Amendment and rights, like *Miranda*, that "protect a fair criminal trial." *Id.* at 241.

facts reliably and, thus, could not decide the further, legal question whether, on the facts, a statement was voluntary. By instituting the relatively clean and crisp *Miranda* rules, and by placing the burden of demonstrating that those rules were followed on the prosecution, the Court meant to improve the ability of trial courts to make constitutionally significant judgments regarding the admissibility of testimonial evidence at trial. *Accord Minnick v. Mississippi*, __ U.S. __, 111 S.Ct. 486, 489-90 (1990).

This better mechanism for securing the Fifth Amendment privilege ensures more reliable results.[28] Compelled statements are often untrustworthy -- the product of physical or psychological pressures, threats, promises of leniency, or other coercive tactics. The *Miranda* rules eliminate or reduce the use of statements obtained in that way by instructing trial courts to receive confessions only if the prosecution carries its burden of proof regarding what went on at the police station.[29]

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[28] The United States states that the "prophylactic" rules established in *Miranda* "lead to the exclusion of highly probative evidence not obtained in violation of the Constitution." Brief of U.S. at 9. This is a *non sequitur*. It leaves the misleading impression that because *some* departures from *Miranda* may not undermine the reliability of statements, compliance with *Miranda* in general retards the pursuit of truth. In fact, *Miranda* enhances the truth-seeking function of criminal trials.

[29] The decision in *Johnson v. New Jersey*, 384 U.S. 719 (1966), to apply *Miranda* only prospectively does not undercut this point. *Johnson* did not deny that *Miranda* serves the interest of achieving reliable outcomes. Instead, the Court recognized that most procedural safeguards have something to do with reliability, and that the matter is typically one "of degree." *Id.* at 729. *Miranda* was denied retrospective effect not because it did not enhance the accuracy of outcomes, but because: (1) prisoners to whom *Miranda* claims would be denied could still raise due process voluntariness claims, and (2) the retroactive application of *Miranda* would have upset reliance interests and se-

(continued...)

The *Miranda* framework also safeguards the fairness of the criminal process. The Fifth Amendment privilege, which *Miranda* secures, rests on a constellation of values derived from Anglo-American history and implicated even when, on the basis of other evidence, it appears that a compelled statement expresses the truth. Among those values is the adversarial nature of our criminal process -- the body and soul of the constitutional scheme. The maintenance of the very structure of criminal trials is, of course, entirely different from the privacy interest in Fourth Amendment cases -- which, again, has nothing necessarily to do with the prosecution of criminal defendants and the validity of their detention.

Turning to the other side of the ledger, the costs of enforcing *Miranda* in federal habeas corpus are also distinguishable from the costs of enforcing the Fourth Amendment exclusionary rule. In order to protect privacy interests unrelated to the criminal process, the exclusionary rule announced in *Mapp* deprives the trial court of tangible evidence that may have relevance to the defendant's guilt. By contrast, *Miranda* enhances the system's ability to arrive at the truth through trustworthy and fair means. Statements are excluded because they have not been shown to be voluntary and reliable.

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[20] (...continued)
riously disrupted the administration of justice.

Nor does the decision in *Oregon v. Hass*, 420 U.S. 714 (1975), that statements obtained in violation of *Miranda* can be used to impeach a defendant's trial testimony, detract from *Miranda*'s purpose to ensure reliable results. *Hass* only ensures that *Miranda* will not be misused to frustrate, rather than to achieve, its own purposes. The idea in *Miranda* is to exclude statements that may be unreliable, not to allow a prisoner to contradict prior statements without the check that the introduction of previous utterances can provide in the search for truth.

C. The Elimination Of *Miranda* Claims From Habeas Corpus Would Only Add To The Federal Courts' Burdens And Generate Friction With The State Courts

The treatment of *Miranda* claims in habeas corpus in the way that *Stone v. Powell* treats Fourth Amendment exclusionary rule claims would produce none of the assumed benefits of *Stone* but would, instead, generate more and greater problems for both the state and the federal courts.

Stone purportedly addresses the concerns the Court has often expressed regarding habeas corpus: it utilizes the state courts for federal-question litigation, enhances the finality of state criminal judgments, reduces friction between the state and federal courts, and promotes federalism. *Stone*, 428 U.S. at 491 n.31.

Prisoners who claim that evidence used against them was illegally seized have no other federal ground to which they can repair; only egregious police practices can support a due process claim touching the production of hard evidence. *E.g., Rochin v. California*, 342 U.S. 165 (1952). In practice, then, *Stone* carves out of the federal picture claims about the way the police conduct searches and seizures.

Similar treatment of *Miranda* claims would not produce similar effects; instead, it would undermine the reliability of criminal convictions, compromise the current system of incentives addressed to state courts, and increase the litigation burden on the federal courts in habeas corpus.

If *Miranda* were not enforced in federal court, some percentage of the unreliable confessions *Miranda* was meant to prevent would be introduced into criminal trials and used to support invalid convictions. To argue that confessions in general are a *good* thing and, there-

fore, that failing to enforce *Miranda* in federal court is also good, *e.g.*, Brief of U.S. at 15-16, is to argue against *Miranda* itself -- in its every application.

Moreover, the elimination of *Miranda* claims from habeas corpus would, paradoxically, impair the finality of state judgments, increase friction between the two court systems, and undermine cooperative federalism. In contrast to *Stone*, prisoners with confession claims *would* have a fall-back position: namely, that the confessions used against them constituted compelled self-incrimination in violation of the Fifth Amendment, or coerced statements obtained in violation of due process.[30]

Charged to consider Fifth Amendment or due process claims, the federal courts would be forced to inquire into the circumstances of interrogations and criminal trials, and the precautions taken to avoid compulsion, but without the relatively clear guidance provided by *Miranda*. *See Minnick v. Mississippi*, 111 S.Ct. at 489-90.

To adjudicate such cases, the federal courts still would have to determine whether suspects were warned of their rights and whether, having been warned, they voluntarily agreed to cooperate. Those matters have always been held to be relevant to the voluntariness question on the open-ended "totality of the circumstances" standard. *E.g.*, *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963); *see Miranda v. Arizona*, 384 U.S. at 534 (White, J., dissenting).

[30] Even the CJLF acknowledges that it would not be "proper" for the federal courts to defer to state court judgments on the voluntariness of confessions. CJLF Brief at 28.

In short, the federal courts would go on entertaining the same petitions from the same state prisoners, inquiring into the same facts in search of the same answers to the same questions. Denied the clarity of *Miranda*, however, they would take longer to decide cases and might well differ more often with the state courts over the proper conclusion to be reached in a case. All this would only take more time and effort, rub judicial feelings raw, and frustrate efficient justice in the bargain.

III. THE COURTS BELOW PROPERLY APPLIED THE SETTLED PRINCIPLE THAT THE DUE PROCESS CLAUSE BARS A STATE FROM PROCURING A CONVICTION ON THE BASIS OF INVOLUNTARY STATEMENTS OBTAINED FROM THE DEFENDANT THROUGH COERCIVE INTERROGATION TECHNIQUES, INCLUDING A PROMISE OF LENIENCY

The warden asserts that the courts below improperly applied a "new rule" of law when they held that the statements Williams made after receiving *Miranda* warnings were involuntary. *Cf. Teague v. Lane*, 489 U.S. 288. This conclusory proposition is merely stated, not argued, and, indeed, is offered only in a footnote -- which befits its station. Petitioner's Brief at 15 n.3.

There is nothing "new" about the proposition that coerced confessions are constitutionally inadmissible at criminal trials, by virtue of the Fifth Amendment or the Due Process Clause. In this case, the courts below relied on a long line of precedents stating and elaborating the "voluntariness" standard, beginning with *Bram v. United States*, 168 U.S. 532 (1897), and extending to Justice White's opinions in *Brady v. United States*, 397 U.S. 742 (1970), and *Arizona v. Fulminante*, __ U.S. __, 111

S.Ct. 1246 (1991). *See also Malloy v. Hogan*, 378 U.S. 1 (1964)(applying the Fifth Amendment privilege to state criminal prosecutions).

The "voluntariness standard" is the paradigm of a rule that "of necessity requires a case-by-case examination of the evidence" and thus infrequently yields a "result so novel that it forges a new rule . . . ." *Wright v. West*, 60 U.S.L.W. at 4647 (Kennedy, J., concurring in the judgment).

Certainly there is nothing unusual about the factual setting of this case, such that the "old" rule that confessions must be voluntary can be said to have been applied in a "novel" setting, *Stringer v. Black*, 112 S.Ct. at 1135, or in meaningfully distinguishable circumstances that altered the "force" of the "old" rule's underlying principle . . . ." *Wright v. West*, 60 U.S.L.W. at 4646 (O'Connor, J., concurring in the judgment). By contrast, this was a routine case, calling for straightforward judgment on the "mixed" question whether, on this record, the police coerced incriminating statements from this suspect.

If the warden had preserved the issue for this Court's consideration, she would have been free to argue that the courts below reached an erroneous decision on the merits of Williams' voluntariness claim. But there is no basis whatever to argue that federal consideration of the merits was foreclosed by this Court's decisions on the retroactive application of "new rules" of law.

The difference between these two arguments is precisely the difference this Court recognized in *Wright v. West*, 60 U.S.L.W. 4639. In truth, the warden in this case is attempting to reargue the point that was not sus-

tained in *West*, namely that the federal habeas courts create "new rules" of law every time they apply even well-settled legal standards to the facts of particular cases. As the opinions in *West* make clear, that is not the law.[31]

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[31] This may not be the last frivolous "new rule" argument this Court receives. Unfortunately, the accounts of "new rules" that have appeared in the Court's precedents to date fail to make it sufficiently clear that the *Teague* line of cases deals with genuine changes in the law. The difficulty lies primarily in the Court's recognition that state reliance interests may be upset not only when the federal habeas courts announce and apply a different abstract legal principle, but also when they invoke an established principle (particularly one stated at a high level of generality) in circumstances wholly different from those in which (and for which) the principle was created.

This latter formulation lacks predictive power and, indeed, invites state's attorneys to attach "new rule" arguments at the end of virtually any brief. The Court would better draw a clean, enforceable distinction between cases that articulate and apply new and different abstract legal standards (and thus "new rules"), on the one hand, and cases that apply settled abstract legal standards (and thus involve "mixed" issues), on the other. At the very least, the Court should expand upon what Justices O'Connor and Kennedy said in *Wright v. West*, 60 U.S. L.W. 4639, to explain when and how the application of old rules to different fact patterns genuinely creates new law. The warden's argument here proves that more is needed if decisions the Court meant to deal with the retroactive effect of genuine changes in the law are to be accurately understood and followed by the lower courts.

CONCLUSION

For the reasons stated above, the Court should affirm the circuit court's judgment.

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